In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY, APPELLANTS

v.

CITY OF JERSEY CITY AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM ON BEHALF OF THE UNITED STATES

In the court below the United States was named in the amended complaint as a defendant pursuant to Section 211 of the Judicial Code (28 U. S. C. 48). Following the application of the Director of Economic Stabilization for leave to intervene, the United States filed its answer to the amended complaint, neither admitting nor denying the allegations thereof, and assigning as reason for its neutrality the fact that the case involved a controversy between two agencies of the federal government, each of which would have an opportunity to present its position through its own counsel. The same situation prevails in this

Court, in that both the Interstate Commerce Commission and the Director of Economic Stabilization (by the Price Administrator), the latter with the authority of the Solicitor General, have presented or will present their views to the Court by briefs and oral argument. Accordingly, in this Court as in the court below the United States takes no position on the issues, much controverted between the parties, as to whether the Interstate Commerce Commission, in approving certain fares to be charged by the appellant Hudson & Manhattan Railroad Company, properly applied the standards of Sections 1 (5) and 15a (2) of the Interstate Commerce Act, and as to whether the record before the Commission contained substantial evidence to support its orders of June 8 and November 2, 1943. However, the grave public necessity of economic stabilization and resistance to inflationary tendencies in the national price structure impels the United States to file this memorandum dealing with certain considerations arising out of the operation of the Emergency Price Control Act of 1942, the Inflation Control Act of 1942, and Executive Orders Nos. 9250, dated October 3, 1942, and 9328, dated April 8, 1943. These considerations, we believe, dictate the conclusion that the decree appealed from, setting aside the Commission's orders of June 8 and November 2, 1943, should be affirmed by this Court for substantially the reasons set forth by the court below in its opinion. These reasons are,

briefly, (1) that the Commission failed to accord to the Director of Economic Stabilization the full and fair hearing required by law, and (2) that the Commission failed to give effect to the economic stabilization program and the efforts of the national government to keep down the cost of living.[1]

1. We do not understand any claim to be made that prior to the order of June 8, 1943, the Director of Economic Stabilization or the Price Administrator was in any way improperly precluded from introducing evidence relevant to the issues before the Commission, or otherwise unduly restricted in participation in the proceedings. So far as the right to a fair hearing is concerned, the impropriety of the Commission's actions lies in the limitation which it imposed on the scope of the reopened hearing convened under the order of September 18, 1943, and in its denial of the Director's motion of October 14, 1943, for a modification of that order so as to remove the limitation on the scope of the hearing. By this limitation, and its retention over the Director's protest, the Director was, we believe, deprived of the opportunity and right to which he was legally entitled, of presenting evidence bearing most di-

[1] We advance these grounds for affirmance of the decree without consideration of, or prejudice to, the arguments made separately by the Director that the Commission's orders were not supported by evidence in the record and were based on an erroneous construction of the Interstate Commerce Act.

rectly upon the issue which still lay open before the Commission—namely, whether to permit a general increase in the rates of a common carrier.

For, regardless of the purported limitation on the scope of the reopened hearing provided for by the order of September 18th, the real issue still before the Commission was whether to permit a general increase in the rates of a common carrier. The Commission, it is true, had already in its order of June 8th passed upon the application for approval of a ten cent fare on the down-town line, found such a fare unjustified, and approved a nine cent fare. But the company's own petition for reconsideration of that order had shown that the nine cent fare was impracticable, and had requested that some other fare be approved. The question before the Commission, therefore, on the petition for reconsideration was what fare would comport with the standards of the Interstate Commerce Act and the national stabilization program, assuming that a nine cent cash fare was precluded. The answer, among others, might have been continuation of the eight cent fare, increase to a ten cent fare, or compromise on the alternative of a ten cent cash fare or eleven tokens for a dollar. The latter proposal was urged by the company in its petition for reconsideration; but the mere fact that the company had made a specific proposal could not limit the jurisdiction and the responsibility of the Commission to consider other possibilities which might be more reasonable

and more closely consonant with the public interest.

The answer of the Commission, that it had already determined the reasonableness of the nine cent fare, so that there was no need for further hearing except as to the "propriety and lawfulness of the modifications" (R. 24), underlines the weakness of the Commission's position. The determination that a nine cent fare was reasonable had been based on a record closed in September, 1942, and containing financial data down only to August, 1942. We do not suggest that the Commission did not proceed with reasonable dispatch in issuing its report and order of June 8th; and if collection of the fare approved in that report and order had been feasible the case might well have ended there. But when the Commission on petition of the company reopened the case, we submit that it necessarily reopened the issue of whether a nine cent fare, however reasonable it might have been as of August, 1942, was still reasonable as of August, 1943. The eight cent fare was still operative, the June 8th order was in effect withdrawn, and the Commission was faced with the necessity of deciding whether to reaffirm its original conclusion, or to accept the company's substitute proposal, or to approve some entirely different fare. Whichever it did it would be issuing a new final order, and it was subject to a duty to base that new order as nearly as practicable on an appraisal of current conditions.

Doubtless the Commission, like other regulatory agencies, has a wide range of permitted discretion in determining when the record made before it is sufficient to justify a conclusion, and whether a rehearing is necessary to advise it fully of the relevant facts. The right of a party to demand a rehearing because of changed economic conditions does not, as this Court said in *United States* v. *Northern Pacific Ry.*, 288 U. S. 490, extend to every insignificant fluctuation, and "may not be invoked where its application would disenable the Commission to protect the interest of the public." But there are limits on the Commission's discretion in this respect, as is shown by *Atchison Etc. Ry. Co.* v. *United States,* 284 U. S. 248, where, at p. 262, this Court said:

> In the discharge of its duty, a fair hearing is a fundamental requirement. *Interstate Commerce Comm.* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right.

By the same standard we believe that the Commission here denied to the Director the fair hearing to which he was legally entitled. It is not

sufficient to say, as the Commission does (Br. pp. 39–40), that the *Santa Fe* case is inapplicable because there two and a half years had elapsed between the closing of the record and the petition for rehearing. As the Court in that case (p. 260) took judicial notice of the occurrence of the 1929 crash, so it can take judicial notice here not only of the effects of gasoline rationing and other like factors upon the passenger traffic of interurban and commuting transportation systems, but also of the pervasiveness and lightning-like rapidity of inflationary episodes. Regardless of whether the evidence offered by the Director would if fully considered have required a change in the Commission's ultimate conclusion—a question which we do not touch—it seems almost self-evident that conditions bearing on the reasonableness of a fare on the Hudson & Manhattan Railroad could not be the same in August and September, 1943, as they had been in August, 1942. Apart from the Commission's duties under the Interstate Commerce Act, its responsibilities to the stabilization program required that it consider *current* conditions so far as practicable before issuing an order which would, as its order of November 2, 1943, did, approve a general increase in a carrier's rates. Refusal to accept an offer by a coordinate agency of the federal government, itself a party to the proceeding, to prove that current conditions so far as they bore on the propriety of such a general increase had radically

changed since the close of the hearings was, we submit, an abuse of discretion and a denial of the full and fair hearing to which the Director was legally entitled.

2. Much of what we have said bears also on the second ground found by the court below for its holding that the Commission's orders were invalid—namely, that the Commission itself "failed to give effect to the economic stabilization program and efforts of the national government to keep down the cost of living" (R. 217). For by its action in declining to consider evidence relevant to the issue before it, the Commission not only deprived the Director of a legal right; it deprived itself of the materials for a proper decision. It was not, as the Commission suggests (Br. p. 39), the reopening of the hearing proposed by the Director, but the Commission's refusal to reopen it, that served to "disenable the Commission to protect the interest of the public." This refusal in itself is sufficient to reflect on the adequacy of the consideration given by the Commission to wartime conditions and the stabilization legislation.

The court below suggested (R. 199) that this phase of the case had been "lightly brushed aside" by the Commission, and with this we agree. To be sure, the Commission says it considered the dangers of inflation, and it quotes in its brief statements which it has made in other contexts as to its part in the fight against those dangers

(Br. pp. 50–59). But the record in this case gives little support to the Commission's protestations. To the earnest arguments of the Director that even a small increase in fare "would have a substantial bearing upon the cost of living in the communities served" by the railroad, the Commission saw fit only to answer (R. 266, 270–271; Br. pp. 54–55):

> It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible.

So casual a dismissal of the protests of the Director seems to us fully to warrant the conclusion of the court below (R. 201):

> * * * that the Commission has failed to consider the dangerous, cumulative effect of the present allowed increase in connection with all the other cumulative sources of inflation, perhaps small in themselves, but tending collectively to defeat the vital policy of controlling inflation as indicated in the above referred to Executive Orders of the President and the Act of October 2, 1942.

We readily concede, as suggested by the Commission (Br. p. 56), that the burden of the war on inflation does not rest solely on the Director of

Economic Stabilization and the Price Administrator, but must be shared with the Commission. By this very fact the Commission is obligated to scrutinize proposed fare increases with the utmost keenness, and to reject them in the absence of a convincing showing of their necessity. By declining to consider the proffer of the Director's evidence as to current necessity for the increase, and lightly disposing of the problem of inflationary tendency by mere reference to its quantitative aspect, the Commission, we believe, failed adequately to discharge the duty that it insists rests upon it. Its failure to raise its sights to the level of wartime conditions and the national economic policy constitutes an error of law of sufficient gravity to demand the injunctive action taken by the court below.

3. Though various of the points in issue on this appeal were also involved in *Vinson* v. *Washington Gas Light Co.*, No. 396 this Term, decided March 27, 1944, adversely to the contentions of the Director there made, we do not believe that that case concludes the issues now presented. Whatever may have been the situation there, here no claim can reasonably be made that the Director's contentions would tend toward "paralyzing or extinguishing local institutions," or that affirmance of the decision below would amount to "the limitation of existing powers conferred by law on regulatory commissions * * * and the endowment of a different federal agency with new and superior rights and powers." The action of the court below

confers no powers upon the Director, and subtracts none from the Commission. It in no way limits the right and duty of the Commission to serve as the responsible administrator of the Interstate Commerce Act, subject only to the usual judicial power of correction. The court below exercised that power of correction not because of any arrogation of conflicting authority by the Director, but because the Commission in its own quasi-judicial sphere misconceived the law and improperly excluded evidence which the Director offered on the issues which the Commission itself had framed. In the *Washington Gas Light* case the sliding scale arrangement, which the Director sought to reexamine, had been in effect for many years; its termination was not in issue in the hearing in which the Director had intervened, and the Public Utilities Commission indeed claimed that it could not be terminated without notice, which had not been given. The Director, in the interest of the stabilization program, was concededly seeking to disturb at least some aspects of a status, in a hearing not convened for that purpose. Here, on the other hand, the status consisted of the eight cent fare, which had been in effect since 1938 and for that matter is still in effect. The issue framed by the Commission when it opened the hearing was whether it should heed the company's petition to revise that status upward, and if so how far. That was the issue when the Commission handed down its first report and order on June 8, 1943, and that was still the issue

when because of impracticability asserted by the company the order of June 8th was in effect revoked and the hearing reopened. In spite of the Commission's attempted segmentation of the issue into artificial components, the fact remains that when the Director asked leave to adduce evidence at the hearing on September 28th and 29th, and upon denial asked to have the limitations of that hearing removed, he was asking to be heard on an issue framed by the Commission and still before it. The Commission's refusal amounted to an insistence that it could with propriety divide the issue into the two separate phases of increase *vel non* and mechanical modification, and could insulate the former from further discussion. This insistence, when the factual record before the Commission was already more than a year old, is, we submit, the strongest indication of the Commission's failure to give adequate consideration to the dangers of inflation which it as well as the Director is required to combat, and fully justifies the conclusion of the court below that the Commission's orders gave insufficient effect to the economic stabilization program and therefore should be set aside.

Respectfully submitted.

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